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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 ROBERT BRUCE MCKAY-ERSKINE,

11 Petitioner,

v.

12 JEFFREY UTTECHT,

13 Respondent.  
14

CASE NO. C18-5024 BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION

15 This matter comes before the Court on the Report and Recommendation (“R&R”)  
16 of the Honorable Theresa L. Fricke, United States Magistrate Judge, Dkt. 21, and  
17 Petitioner Robert Bruce McKay-Erskine’s (“McKay-Erskine”) objections to the R&R,  
18 Dkt. 24.

19 On October 1, 2018, Judge Fricke issued the R&R recommending that the Court  
20 deny McKay-Erskine’s petition on the merits. Dkt. 21. On January 6, 2019, McKay-  
21 Erskine filed objections. Dkt. 24.  
22

1       The district judge must determine de novo any part of the magistrate judge's  
2 disposition that has been properly objected to. The district judge may accept, reject, or  
3 modify the recommended disposition; receive further evidence; or return the matter to the  
4 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

5       In this case, McKay-Erskine fails to identify any error in the R&R. Although  
6 McKay-Erskine filed lengthy objections, he simply remakes his original arguments on the  
7 alleged deficiencies of his trial counsel. *See* Dkt. 24 at 16–37 (objections as to the merits  
8 of his petition). The single issue that the Court will address is McKay-Erskine's claim  
9 that his counsel was ineffective for refusing to prepare McKay-Erskine to testify and not  
10 permitting him to testify. It is undisputed that the right to testify in one's defense is a  
11 decision reserved solely for the defendant. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508  
12 (2018). Thus, it is troubling that McKay-Erskine alleges his attorney prevented him from  
13 testifying. However, on habeas review, McKay-Erskine bears the burden of showing  
14 both deficient performance and prejudice. *Matylinsky v. Budge*, 577 F.3d 1083, 1097  
15 (9th Cir. 2009). The state court denied McKay-Erskine's claim because he failed to show  
16 prejudice. In other words, he failed to show that the result of the trial may have been  
17 different if he would have testified. In fact, McKay-Erskine fails to identify any evidence  
18 or present any argument on the issue of prejudice. *See* Dkt. 8 at 5 (petition); Dkt. 15 at  
19 13–14 (traverse); Dkt. 24 at 33–37. On federal review, McKay-Erskine fails to establish  
20 that the state court's conclusion was objectively unreasonable. *Harrington v. Richter*,  
21 562 U.S. 86, 101 (2011). Therefore, the Court having considered the R&R, McKay-  
22 Erskine's objections, and the remaining record, does hereby find and order as follows:

- (1) The R&R is **ADOPTED**;
- (2) McKay-Erskine's petition is **DENIED**;
- (3) A Certificate of Appealability is **DENIED**; and
- (4) The Clerk shall enter a JUDGMENT and close the case.

Dated this 5th day of April, 2019.



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BENJAMIN H. SETTLE  
United States District Judge